



January 2, 2025

Robert Martin  
Office of the President  
Institute of American Indian Arts  
83 Avan Nu Po Road  
Santa Fe, New Mexico 87508

*Sent via U.S. Mail and Electronic Mail (president@iaia.edu)*

Dear President Martin:

FIRE, a nonpartisan nonprofit dedicated to defending freedom of speech,<sup>1</sup> is concerned by the Institute of American Indian Arts' punishment of student David McNicholas for alleged bullying based on his decision, as senior editor of the *Young Warrior* student magazine, to publish anonymous student submissions critical of some IAIA administrators. While the critical commentary clearly offended some readers, including the named administrators, the submissions and related social media activity do not meet the legal standards for defamation or harassment and are protected by the First Amendment. IAIA must rescind any remaining sanctions on McNicholas, remove the incident from his record, and revise its anti-bullying policy to conform with constitutional requirements.

As *Young Warrior's* senior editor, McNicholas chose to publish two anonymous student submissions in its March 21 issue reacting to the March 18 resignation of IAIA Student Success Advisor Karen Redeye.<sup>2</sup> The first was an anonymously submitted op-ed urging students to speak up against the IAIA administration's "oppression" because "things are not going well" when "good people [like Redeye] have no choice but to leave or sacrifice their own mental, emotional [sic] well-being."<sup>3</sup> It identified Redeye's supervisors as Student Success Department Interim Director Lorissa Garcia and Dean of Students Nena Martinez Anaya, and accused

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<sup>1</sup> For more than 20 years, the Foundation for Individual Rights and Expression (FIRE) has defended freedom of expression and other individual rights on America's college campuses. You can learn more about our mission and activities at [thefire.org](http://thefire.org).

<sup>2</sup> *Untitled student editorials*, *YOUNG WARRIOR*, Mar. 21, 2024, at 10–11 (on file with author). The recitation here reflects our understanding of the pertinent facts. We appreciate that you may have additional information and invite you to share it with us. To that end, please find enclosed an executed privacy waiver authorizing you to do so.

<sup>3</sup> *Id.* at 10.

Garcia of bullying Redeye.<sup>4</sup> The second item at issue was an image of a flyer that read, “Karen Redeye keeps pantries full[.] Nena Martinez robs them[.] Redeye Redemption[.]”<sup>5</sup>

On March 21, IAIA Provost Felipe Colon notified McNicholas that he was investigating two complaints of alleged bullying filed against McNicholas.<sup>6</sup> The first complaint, filed by an anonymous student, alleged that McNicholas published the anonymous student op-ed in the *Young Warrior* without properly contextualizing the article’s claims about Redeye’s resignation. According to the complaint, this could ostensibly lead readers to interpret the letter’s “gossip and heresy opinions” as fact.<sup>7</sup> Claiming that readers interpreting the letter’s “damaging and defamatory content” as facts “could be damaging to other people,” the complaint alleged that publishing the letter without sufficient context or a disclaimer violated the IAIA Student Handbook Anti-Bullying Policy.<sup>8</sup>

The second complaint, filed by an unnamed IAIA staff member, alleged that “the *Young Warrior* and [McNicholas] as Senior Editor have published derogatory and unfounded misinformation about them, their actions, roles, and alleged responsibility regarding the resignation of [ ] Redeye” and “the publication of these libelous allegations is a direct violation of the IAIA Student Handbook Anti-Bullying Policy and is damaging their professional and personal reputation and relationships with others.”<sup>9</sup>

On March 27, Interim Director Garcia also filed a complaint against McNicholas echoing the allegation made in the March 21 staff complaint.<sup>10</sup> Garcia further alleged that McNicholas, as the Associated Student Government Public Relations Officer, used the ASG Instagram account to “promote and distribute [the] derogatory and unfounded misinformation and rumors about” Garcia’s role in Redeye’s resignation. Garcia based this allegation on the claim that the ASG account “liked” a student’s post of an image of the “Redeye Redemption” flyer published in the *Young Warrior*.<sup>11</sup> (IAIA also punished the student who posted the flyer, which resulted in the student leaving school and incurring significant financial hardship and housing insecurity.)<sup>12</sup>

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<sup>4</sup> *Id.* (“And people like Lorissa Garcia have time in their day to BULLY someone like Karen? It smells like jealousy, and it smells like OPPRESSION...”). Anaya retired from her position in May 2024. Email from Felipe Colon, Provost, to IAIA Students et al. (Apr. 23, 2024, 12:03 PM) (on file with author). Garcia resigned shortly after.

<sup>5</sup> *Untitled student editorials*, *supra* note 2 at 11.

<sup>6</sup> Email from Colon, to David McNicholas, student (Mar. 21, 2024, 5:28 PM) (on file with author).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Letter from Colon to McNicholas (Mar. 29, 2024) (on file with author). Also on March 21, Colon contacted the members of the IAIA Associated Student Government—including McNicholas—regarding the alleged involvement of ASG members in “bullying, defamation, and possibly legally actionable slander and liable [sic] against members of the IAIA staff and in violation of the IAIA Student Handbook Anti-Bullying Policy.” Email from Colon to Laura Ten Fingers et al. (Mar. 21, 2024, 11:31 AM) (on file with author).

<sup>10</sup> Letter from Colon to McNicholas, *supra* note 9.

<sup>11</sup> *Id.*

<sup>12</sup> Insofar as our arguments also apply to this student, we further ask that IAIA rescind any sanctions or restrictions imposed on this student and remove any notice of this disciplinary action from this student’s record.

After meeting with McNicholas on March 29,<sup>13</sup> Colon determined that the three complaints' allegations were valid and imposed sanctions on McNicholas. McNicholas was ordered to issue written and public apologies to Garcia and Anaya for "having defamed and slandered them" in violation of the IAIA Anti-Bullying Policy,<sup>14</sup> publish retractions in the *Young Warrior* and on the ASG Instagram account.<sup>15</sup> McNicholas was also placed on "Institute and Disciplinary Probation" through the 2024–2025 academic year and was suspended from student housing through the Fall 2024 semester.<sup>16</sup>

Following Colon's decision on McNicholas, Redeye emailed you regarding the reasons for her abrupt resignation, explaining she "resigned from IAIA due to repeated lack of support from [her] superiors, maltreatment, and bullying from direct supervisors" that "elevated to the point of affecting [her] physically."<sup>17</sup> Citing the new evidence in Redeye's email that reinforced the factual underpinnings of the published items, McNicholas appealed the sanctions.<sup>18</sup> But the Student Hearing and Review Panel declined to hear the appeal, inexplicably citing the lack of new evidence as one of its reasons.<sup>19</sup>

IAIA formed a new panel to hear the appeal because the original panel had not complied with the requirements of IAIA policy.<sup>20</sup> After a formal hearing on May 3, the new panel affirmed the Institute and Disciplinary Probation but lifted the other sanctions.<sup>21</sup>

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<sup>13</sup> Also present at the meeting were Counselor Eliza Combs and Professor Kim Parko. Email from Colon to McNicholas (Mar. 29, 2024, 10:57 AM) (on file with author).

<sup>14</sup> Letter from Colon to McNicholas, *supra* note 9 ("You will issue an IAIA Community public apology to Dean Anaya and Ms. Lorissa Garcia including a statement admitting to your role in spreading harmful gossip in print and via social media, and to your violation of the IAIA Anti-Bullying Policy.").

<sup>15</sup> *Id.* ("You will submit to the *Young Warrior* Club a retraction to be printed in the next issue of the *Young Warrior* and to the IAIA-ASG a retraction on the 'iaiaasg' Instagram account, admitting to the inappropriate publishing and promotion of hurtful gossip, defamatory statements, and slander.").

<sup>16</sup> *Id.* The residential suspension also bars McNicholas from visiting student housing. *See Student Handbook 2023–2024*, INST. OF AMER. INDIAN ARTS, at 72 (on file with author) ("A suspension from residential housing places a student on restricted status Persona Non-Grata (PNG) from the housing area. Individuals with PNG status may not enter the residential units or housing areas for any reason. Students found on the premises risk being arrested for trespassing.").

<sup>17</sup> Email from Redeye to Martin et al. (Mar. 29, 2024, 4:32 PM) (on file with author).

<sup>18</sup> David McNicholas, *Request for Hearing*, INST. OF AM. INDIAN ARTS (Mar. 30, 2024) (on file with author).

<sup>19</sup> The reasons cited for declining the appeal were that "McNicholas took responsibility for the actions that were the basis for the complaint," did not offer new evidence, and his actions met the definition of bullying in the IAIA Student Handbook. Email from Colon to McNicholas (Apr. 4, 2024, 5:16 PM) (on file with author).

<sup>20</sup> Email from Colon to McNicholas (Apr. 10, 2024, 4:53 PM) (on file with author). The original panel lacked an ASG member, as required by the student handbook. *See Student Handbook 2023–2024*, *supra* note 16 at 74.

<sup>21</sup> Email from Diana Ellenwood, Student Services Coordinator, to McNicholas (Apr. 30, 2024, 3:27 PM) (on file with author).

As a public, tribal college,<sup>22</sup> IAIA’s actions and decisions—including its pursuit of disciplinary sanctions,<sup>23</sup> interactions with student journalists,<sup>24</sup> and maintenance of policies implicating student and faculty expression<sup>25</sup>—must comply with the First Amendment’s requirements.

The First Amendment protects the freedom of the press to publish vehement criticism of government officials (including college administrators) like that contained in the anonymous editorial submissions printed in the *Young Warrior*. In fact, such criticism is at the core of the Constitution’s guarantee of expressive rights.<sup>26</sup> The “bedrock principle underlying” freedom of speech is that it may not be restricted on the basis that others find it offensive.<sup>27</sup> As the Supreme Court has explained, “debate on public issues should be uninhibited, robust, and wide-open, and ... may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>28</sup> This is particularly true in the context of an institution of higher education,<sup>29</sup> where “conflict is not unknown”<sup>30</sup> and “dissent is expected and, accordingly, so is at least some disharmony.”<sup>31</sup>

Even allegedly damaging “misinformation and rumors” are protected speech unless the expression meets the high standards for unprotected defamation.<sup>32</sup> McNicholas’s and the *Young Warrior*’s publication of the anonymous student submissions came nowhere near the standard for defamation, specifically that the publisher published false material knowing of its falsity or with reckless disregard for its truth or falsity.<sup>33</sup> The First Amendment protects “those

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<sup>22</sup> *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”) (internal citation omitted); see also *Nally v. Graham*, 551 F.Supp.3d 1062, (D. Kan. 2021) (recognizing that the First Amendment applies to public tribal colleges).

<sup>23</sup> *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 667–68 (1973).

<sup>24</sup> *Stanley v. Magrath*, 719 F.2d 279, 282 (8th Cir. 1983); see also *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30 (1995).

<sup>25</sup> *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995).

<sup>26</sup> See, e.g., *Bridges v. California*, 314 U.S. 252, 270 (1941) (“[I]t is a prized American privilege to speak one’s mind, although not always with perfect good taste, on all public institutions.”).

<sup>27</sup> *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (burning the American flag is protected by the First Amendment based on the “bedrock principle” that government actors “may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”).

<sup>28</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

<sup>29</sup> *Papish*, 410 U.S. at 667–68 (student newspaper’s use of vulgar headline, “Motherfucker Acquitted,” and front-page “political cartoon ... depicting policemen raping the Statue of Liberty and the Goddess of Justice” were protected speech).

<sup>30</sup> *Hulen v. Yates*, 322 F.3d 1229, 1239 (10th Cir. 2003).

<sup>31</sup> *Higbee v. E. Mich. Univ.*, 399 F.Supp.3d 694, 704 (E.D. Mich. 2019).

<sup>32</sup> *Snyder v. Phelps*, 562 U.S. 443, 448, 461 (2011) (holding signs outside of soldiers’ funerals reading “Thank God for Dead Soldiers,” “Thank God for IEDs,” and “Fags Doom Nations” was expression protected by the First Amendment); *N.Y. Times Co.*, 376 U.S. at 271 (First Amendment protection generally “does not turn upon ‘the truth, popularity, or social utility of the ideas and beliefs which are offered’” (internal citation omitted)).

<sup>33</sup> *N.Y. Times Co.*, 376 U.S. at 279–80; see also *Masson v. New Yorker Mag., Inc.*, 501 U.S. 496, 510 (1991) (actual malice is a subjective standard that requires the accuser to prove by clear and convincing evidence that the speaker “‘in fact entertained serious doubts as to the truth of his publication,’ or acted with a ‘high degree of

negligent or careless false statements that are inevitable in free debate”<sup>34</sup> so as to ensure that “the freedoms of expression ... have the ‘breathing space’ that they ‘need to survive.’”<sup>35</sup> The First Amendment imposes such a high standard to establish defamation regarding public officials precisely to prevent what happened at IAIA—public officials abusing defamation law to shut down critical debate about the governance of public institutions.<sup>36</sup> Here, the IAIA has not met its burden of establishing falsity, let alone McNicholas’s awareness of falsity.<sup>37</sup> Indeed, Redeye’s email complaining of her treatment at the hands of administrators demonstrates that McNicholas had good reason to believe the student submissions were based in truth.<sup>38</sup>

Finally, IAIA’s Anti-Bullying Policy itself is unconstitutional.<sup>39</sup> In order for so-called “bullying” to be punishable, it must rise to the level of actionable harassment. The Supreme Court has established a strict definition of actionable harassment, limiting it to expression that discriminates on the basis of protected status AND is severe, pervasive, and objectively offensive, among other things.<sup>40</sup> Even if some speech that would be penalized under the Anti-Bullying Policy is unprotected—for instance, speech that actually communicates a true threat of violence or meets the standard for discriminatory harassment—the terms of the policy sweep in a stunningly wide variety of protected expression.<sup>41</sup> By classifying even the friendly “taunting” of a sports rivalry or the gentle “teasing” of friends as punishable bullying,<sup>42</sup> the Anti-Bullying Policy’s potential for unconstitutional applications far outweighs IAIA’s legitimate objectives of protecting students and staff from discrimination or abuse.

By using subjective and ill-defined terms such as “embarrassing,” “inappropriate,” and “offensive” to describe prohibited speech, IAIA’s policy is also unconstitutionally vague, failing to provide fair notice of precisely what is prohibited. That can only encourage arbitrary and discriminatory enforcement—such as that seen in IAIA’s punishment of McNicholas.<sup>43</sup>

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awareness of ... probable falsity” (internal citations omitted); *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (failure to investigate does not demonstrate actual malice).

<sup>34</sup> *Love v. Rehfus*, 946 N.E.2d 1, 15 (Ind. 2011).

<sup>35</sup> *N.Y. Times Co.*, 376 U.S. at 271–72 (internal citation omitted).

<sup>36</sup> *Id.* (“Criticism of [public officials’] official conduct does not lose its constitutional protection merely because it is effective criticism and hence diminishes their official reputations.”).

<sup>37</sup> In defamation, the plaintiff (or accuser) bears the burden of showing falsity. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986).

<sup>38</sup> See Email from Redeye to Martin, *supra* note 17 (explaining that Redeye resigned because her direct supervisor bullied her).

<sup>39</sup> Among other things, the policy identifies as bullying “teasing, name-calling, inappropriate sexual comments, taunting,” “damaging the reputation or relationship of others, excluding someone intentionally, telling others not to be friends or associate with someone, spreading rumors about someone, and embarrassing someone in public,” “making inappropriate hand gestures,” “offensive text messages or emails, rumors sent by e-mail or posted on social networking sites, and embarrassing pictures, videos, websites, or fake profiles.” *Student Handbook 2023–2024*, *supra* note 16 at 29.

<sup>40</sup> *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999); *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 270 (2001).

<sup>41</sup> *United States v. Stevens*, 559 U.S. 460, 473 (2010) (regulation violates the First Amendment for overbreadth if “a substantial number of its applications are unconstitutional, judged in relation to the statute’s legitimate sweep”) (quotations and citations omitted).

<sup>42</sup> See *Student Handbook 2023–2024*, *supra* note 16 at 29.

<sup>43</sup> *United States v. Williams*, 553 U.S. 285, 304 (2008).

Students will undoubtedly refrain from engaging in protected speech in order to avoid “crossing a line” they have no hope of seeing, which can only result in a broad, and unlawful, chilling of campus speech.

McNicholas’s decision to publish and promote the student submissions to the *Young Warrior* is clearly protected. To be sure, the First Amendment does not shield either party from criticism by the aggrieved IAIA officials or others in the broader community. But IAIA may not punish McNicholas for dubious charges of bullying or restrict his right to publish critical commentary about IAIA officials. We request a substantive response to this letter no later than January 16, confirming IAIA will rescind any sanctions or restrictions on McNicholas, remove any notice of this disciplinary action from his record, and revise its Anti-Bullying Policy to conform to the First Amendment. We would be happy to assist IAIA in revising its Anti-Bullying Policy—free of charge, in accordance with our charitable mission.

Sincerely,

A handwritten signature in black ink that reads "Jessie Appleby". The signature is written in a cursive, slightly slanted style.

Jessie Appleby  
Program Officer, Campus Rights Advocacy

Cc: Felipe Colon, Provost

Encl.